Access to administrative documents: a recent ruling by the T.A.R. Milano

A recent ruling by Section IV of the T.A.R. Lombardy-Milan 13 December 2024 no. 3638 takes up the consolidated principles of the administrative jurisprudence concerning access to administrative documents, offering the opportunity to review the conditions that justify the exercise of the right of access to documents, as well as to analyse the coordination challenges between the "classic" documents' access under Law no. 241/1990 and the "civic" access under Legislative Decree no. 33/2013.

The case

In this case, the plaintiff requested access to documents related to an open design tender (*concorso di progettazione a procedura aperta*) called by a Municipal Administration in Lombardy for the construction of a new municipal secondary school.

According to the tender's *lex specialis*, the procedure was divided into two phases: in the first phase, the five best "design proposals" were identified; the latter were admitted to the second phase, during which the selection board would choose the winning project.

The plaintiff – whose name was among those of the professionals making up the working group participating in the first phase of the procedure – complained that he was no longer mentioned in the tender documents adopted during the second phase and that he was not included in the temporary grouping of companies formed to carry out the contract.

To defend his legal position as a member of the working group who, although having participated in the second phase of the competition, was unjustifiably excluded from the negotiation phase of the subsequent design stages, with an initial application for access to the deeds pursuant to Article 22 et seq. of Law 7 August 1990 No 241 (so-called **documental access**), the applicant requested the inspection of the tender documents and all the documentation submitted by the five finalist working groups.

After the Municipality rejected the request, citing a lack of a current and concrete interest in the disclosure of the requested documentation, the plaintiff made a new request for access to the documents pursuant to Article 5, paragraph 2, of Legislative Decree 14 March 2013 No. 33 (so-called **generalised civic access**), which does not require a specific interest on the applicant's part.

However, the Administration failed to respond, suspending *sine die* the procedural deadlines and forcing the plaintiff to file an appeal to assert their right to access the documents, with the consequent order of the Administration to release all the documentation requested.

With the judgment in question, the Regional Administrative Court, called upon to

verify whether or not the conditions existed for recognising the applicant's right of access to the requested documents, assessed the existence of such conditions by comparing them to the two main regulatory foundations: Articles 22 et seq. of Law No. 241/1990 and Article 5 of Legislative Decree No. 33/2013.

The establishment of the entitlement to documentary access

First of all, with regard to the request for access to documents pursuant to Law No. 241/1990, the Regional Administrative Court held that the appeal was unfounded: although the applicant had invoked the need to access the documents for defence purposes, the existence of an instrumental link (*nesso di strumentalità*) between access to the requested documents and the defence needs had not been demonstrated in a precise and specific manner.

On this point, it is worth noting how the approach taken by the Milan Judge in the judgment under review fully complies with what was ruled by the Plenary Meeting of the Council of State in 2021 on the subject of defensive access, i.e. with regard to those documents, "*knowledge of which is necessary to take care of or defend one's own legal interests*" (see Article 24, paragraph 7, Law No. 241/1990).

In particular, the Plenary Assembly's invitation is that of not deeming sufficient 'a generic reference to unspecified evidentiary and defensive needs, whether they refer to a trial already pending or still to be instituted, since the ostension of the document passes through a rigorous examination of the necessary instrumental link between the requested documentation and the final disputed situation' (see Council of State, Ad. Plen., 18 March 2021 no. 4).

In light of the aforementioned hermeneutic guideline, the appellant was not deemed to have a qualified interest justifying access to the administrative documents, since he had participated only in the first phase of the tender procedure and, for reasons related to the private relationships between the professionals of the working group, he had not been involved in the second phase of the procedure, which had its own autonomy both objectively and in terms of the participating subjects (see T.A.R. Lombardia-Milano, no. 3638/2024, paragraph 23.2).

But there is more. From the case file, it did not clearly and incontrovertibly emerge what the actual need to defend was, considering not only the vagueness of the plaintiff's allegations, but also the content of a settlement agreement that excluded any form of litigation, either judicial or extrajudicial, concerning the tender procedure.

Therefore, there were no reasons such as to justify the unlawfulness of the refusal measure adopted by the municipal Administration and the consequent infringement of the right of access complained of.

The unlawful silence on the request for generalised civic access

Notwithstanding the fact that the request for documentary access was deemed unfounded by the Regional Administrative Court, we proceeded to examine the reasons which, in the appellant's opinion, at least justified the exercise of the right of access recognised by Legislative Decree No. 33/2013.

As is well known, in the direction of increasing transparency and fully guaranteeing

freedom of access to the data and documents held by the public administrations (in addition to those subject to publication pursuant to the decree), the rules on civic access considerably broaden the number of persons entitled to access and the documents and elements that can be made known, not requiring – unlike "classic" access – the existence of a direct, concrete and current interest on the part of the applicant.

With regard to the application pursuant to Article 5 of Legislative Decree No. 33/2013, the complaint raised by the appellant was based on the unlawfulness of the silence of the Public Administration, since the time limits set forth in paragraph 6 of the aforementioned article, according to which "*the civic access procedure must be concluded with an express and reasoned measure within thirty days from the submission of the application with the communication to the applicant and to any other interested parties, if any*".

In view of the clear-cut procedural framework laid down by Law, the Court found the appellant's complaint to be well-founded: the local authority, after acquiring the observations of the opposing party, had failed to make a definitive ruling on the request in question by means of an express and reasoned act within 30 days from the submission of the application.

However, with regard to the second profile, once it had been established that the Administration was obliged to give a ruling on the request for access, since the administrative court could not directly substitute the Administration in adopting in adopting the express and reasoned measure, a time limit of 15 days was set for the adoption of a final determination of the proceedings.

Conclusions

Faced with an institution such as access to administrative documents that rises to the rank of a general principle of administrative activity and acquires a growing autonomy with respect to the proceedings, the judgment in comment confirms once again – in particular, with respect to documental access pursuant to Articles 22 et seq. of Law No. 241/1990 – that the exercise of such right can never be preordained to a generalised control of the work of the Public Administrations, which are therefore called upon to accept only those requests that are adequately motivated and instrumental.

For this reason, the Administrative Judge's invitation is clear: although the private applicant cannot be required to provide a *probatio diabolica* as to the existence of the link of instrumentality, a clear description of the reasons that make the documentation subject to access necessary for the protection of the legal position represented remains fundamental.

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